[ORIGINAL CIVIL JURISDICTION]
HUGGARD, C.J.
March 23, 1934.

In the Matter of the will dated the 11th day of March, 1913 and Codicil dated the 16th day of April, 1919 of Lee Choon Guan deceased.

LEE SIEW BIN.....Plaintiff.

vs.

TAN TECK NEO (w) & 4 others....Defendants.

[SINGAPORE ORIGINATING SUMMONS No. 175 of 1933]

Will—construction—gift of income until distribution—gift over on death before distribution—forfeiture clause—whether operative where gift over is absolute—repugnancy—annuity for life payable out of income of share—whether a charge on corpus or a continuing charge on income.

A testator by his will as varied by a codicil directed his trustees to divide the net income derived from his estate at the end of every month into 38 shares and to pay certain specified shares thereof to his sons during their respective lives. He provided for a gift over of such shares of income on the death of any of his sons before the date of distribution of his estate in favour of the issue of such deceased son in the proportion of 2 shares to a male and 1 to a female subject to the payment of an annuity of $300 *per mensem* to the widow of such deceased son during her lifetime. The Will further directed that the residue of the estate should be distributed at the expiration of 21 years after the testator's death by being divided among the testator's children then living and the issue of his children then dead *per stirpes* in the same proportions as the income thereof had been divisible.

The Will also contained a clause providing for the forfeiture of the interest of any beneficiary who should commit permit or suffer any default or process whereby his or her interest would but for such provision become vested in or payable to any other person or persons.

One of the testator's sons was adjudged bankrupt and died before the date of distribution leaving a widow a son and a daughter.

Held, that the deceased son's share in the income and the corresponding share in the corpus were vested in such deceased son's son and daughter in the respective proportions of 2 shares to the son and 1 to the daughter but subject to the right of the widow to the payment of $300 per month out of the share of income during her life.

Held further, that the gift over on death of the son being an absolute gift was not subject to the provisions of the forfeiture clause in the Will.

Held further, that the direction for payment of the annuity charged it only on the share of income during the widow's life or until the date of distribution and did not create a charge on the corpus nor was it a continuing charge on the income after the widow's death.

Originating Summons heard by Huggard, C.J.

The summons was issued by the plaintiff who was the son of Lee Pang Seng one of the sons of Lee Choon Guan deceased. The defendants were trustees of the Will of Lee Choon Guan deceased. The summons propounded certain questions arising upon the construction of the Will of the testator for determination by the Court and such questions appear sufficiently from the judgment below. The Will was dated the 11th March, 1913. The testator left a Codicil thereto dated the 16th April, 1919. He died on the 27th August, 1924 and his Will and Codicil were proved on the 6th July, 1925. The following are the material provisions of the Will as varied by the Codicil:—

"13. After providing for the outgoings payments and charges hereinbefore set out I direct my trustees to divide the residue of the income rents and profits derived from my house and other real and leasehold property and mortgages at the end of every month into thirty-eight equal parts or shares and to pay to my son Lee Pang Seng eight (8) of such equal parts or shares, to each of my sons Lee Pang Chuan, Lee Pang Soo and Lee Sin Siang six (6) of such equal parts or shares and to each of my daughters Lee Poh Lian, Lee Poh Choo and Lee Poh Neo four (4) of such equal parts or shares.

"16. In case any of my children referred to in clause thirteen (13) hereof shall have died before my decease or before the date of distribution of the aforesaid two funds or either of them shall have arrived leaving issue then the share of any child so dying shall go to and devolve upon the child or children or remoter issue of such deceased child of mine who being male attains the age of 21 years or being female attains the age or marries (whichever event shall first happen) and if more than one in the proportion of two shares to each male and one (1) share to each female but so that the child, children or remoter issue of any deceased child of mine shall take between them in the aforesaid proportions only such share as their parent or parents would have taken had he or she survived and attained a vested interest."

"18. I direct that the widow of any son or remoter male issue of mine dying before the date of distribution of my residuary estate referred to in Clause 24 hereof shall be entitled to be paid monthly during her lifetime the sum of three hundred dollars ($300) out of the income of the share of such deceased son or remoter male issue before the same shall go over under the provisions of this my Will."

"23. I declare that if any person who is or may become a legatee or beneficiary under this my Will shall commit permit or suffer any act default or process whereby his or her interest or any part thereof would but for this present provision become vested in or payable to any other person or persons then such interest in so far as it is then unpaid or unsatisfied shall absolutely cease and determine as if such person were dead and any gift over of such interest shall then come into operation."

"24. Upon the expiration of 21 years after the date of my death I direct that my

trustees shall divide the whole of my residuary real and personal estate among the children then living and the issue of children then dead of my children referred to in Clause thirteen (13) hereof (hereinafter called the residuary legatees) *per stirpes* in the proportion in which my said children or their issue shared in the income thereof but so that the members of each *stirpes* shall inherit as between themselves in the proportion of two (2) shares to a male and one (1) share to a female and in case any one or more of the residuary legatees shall have died leaving issue such issue shall take the share which his her or their parent or ancestor would have taken if he or she had lived to attain a vested interest and if more than one in the proportion of two (2) shares to a male and one (1) share to a female."

Lee Pang Seng was adjudicated a bankrupt on the 23rd October, 1925. He died at Macao on the 23rd February, 1930 leaving a widow, a son the plaintiff and a daughter. The share of income bequeathed to Lee Pang Seng had become insufficient to meet the monthly payment of $300 to the widow.

Cobbett for Plaintiff applied to amend the Originating Summons by adding at the end of question 1 the following words "And whether such interest is subject to the provisions of clause 23 (forfeiture)."

Page for the defendants not objecting the amendment was allowed.

Cobbett continued. The 1st part of question 1 is whether the share of Lee Pang Seng deceased in the income of the testator's residuary estate and the corresponding share in the corpus is vested absolutely in the Plaintiff and his sister in the proportion of two shares to a male and one share to a female subject to the widow's right to payment of a monthly sum of $300 out of the income. It is agreed by the trustees that such shares of income and of corpus vest absolutely subject to the widow's allowance out of income.

The 2nd part of question 1 is whether this interest of the Plaintiff and his sister is subject to the provisions of clause 23 of the Will (the forfeiture clause).

It was decided in Originating Summons No. 108 of 1927 that this clause was applicable in the case of Lee Pang Seng's bankruptcy and that his share of income did not pass to the Official Assignee. The case of the grandchildren is on a different footing and is governed by *In re Smith*, (1916) 1 Ch. 369. The gift to them is an absolute gift contingent only on the existence of the grandchildren and the answer to this part of question 1 should be that the gift to the grandchildren is not subject to the forfeiture clause.

Question 2 is raised at the express request of the trutees and is whether the widow's allowance out of income is a charge upon the corpus or a continuing charge in favour of the widow her executors and administrators on the income until all arrears accrued due during her lifetime shall have been paid. This gift to the widow arises under clauses 18 and 19 of the Will and 10 of the Codicil.

The necessity for a decision on the point arises because the income from the estate has been so much reduced of recent years that there is insufficient to pay Lee Pang Seng's widow her $300 a month. If in future the income of the estate increases to such an extent that Lee Pang Seng's share is more than $300 per month can the trustees rightly apply the excess in making up the arrears and if so can they go on doing so after the widow is dead or after the period of distribution has arrived?

The arrears of income cannot be a charge on capital. At most such arrears may be made up out of excess current income only while the widow lives or until the period of distribution arrives whichever period is the shorter.

Page for the defendants. The monthly charge in favour of Lee Pang Seng's widow is a continuing charge. If there is a shortage of income it can be recouped out of income of subsequent months. If necessary, the widow's allowance is also a charge on corpus.

The following authorities were cited:—

Stelfox v. *Sugden*, 70 E.R. 410.
Wormald v. *Muzeen*, 17 Ch. D. 167.
In re Bodcn, (1907) 1 Ch. 132.
In re Bigge, (1907) 1 Ch. 714.
In re Howarth, (1909) 2 Ch. 19.
In re Watkins, (1911) 1 Ch. 1.
In re Young, (1912) 2 Ch. 479.
In re Stoodley, (1916) 1 Ch. 242.
In re Platt, (1916) 2 Ch. 563.

Cur. Ad. Vult.

HUGGARD, C.J.—This Originating Summons asks for the determination of certain questions arising under the last Will and Codicil of Lee Choon Guan deceased.

The first question is whether, in the events which have happened, the share of Lee Pang Seng deceased (one of the testator's sons) in the income of the testator's residuary estate and the corresponding share in the corpus is vested absolutely in the Plaintiff and his sister (who are the son and daughter of the said Lee Pang Seng) in the proportion of two shares and one share respectively, subject to the right of Lee Pang Seng's widow to a monthly sum of $300 out of the income; and whether such interest is subject to the provisions of Clause 23 of the Will as to forfeiture.

There is no conflict between the parties regarding the first part of this question, and I am satisfied that the answer is in the affirmative, that is to say, the Plaintiff and his sister are entitled to the share of their father Lee Pang Seng in the income of the testator's residuary estate and to the corresponding share in the corpus in the proportions mentioned above, but subject to the right of Lee Pang Seng's widow to a monthly sum of $300 out of the income.

The second part of the question is whether the respective interests of the Plaintiff and his sister are subject to the provisions of Clause 23 of the Will as to forfeiture. This Clause reads as follows:—

[The judgment here quotes Clause 23 of the Will set out above].

It seems to me that when the latter part of this Clause is read in conjunction with Clause 16 of the Will the gift over under Clause 23 must be deemed to be an absolute gift.

It is clear from *In re Smith*, (1916) 1 Ch. 369 and other authorities that a forfeiture Clause of this sort may properly be attached to a contingent gift but is void for repugnancy if attached to an absolute gift.

It follows that, as in my opinion the gift over to the Plaintiff and his sister is an absolute gift, their respective interests are not subject to the provisions of Clause 23 as to forfeiture. The answer to the latter part of the first question is therefore in the negative.

The second question for determination is whether the annuity to Lee Pang Seng's widow under Clause 18 of the Will as varied by Clause 10 of the Codicil is:—

(a) a charge upon the corpus; or
(b) a continuing charge in favour of the widow, her executors and administrators, on her deceased husband's share of the income until all arrears of such annuity shall have been paid in full.

Clause 18 of the Will as varied by Clause 10 of the Codicil reads as follows:—

[The judgment here quotes Clause 18 of the Will set out above]

I interpret this Clause to mean that it was the testator's intention that the widow of any deceased son should be entitled to an annuity at the rate of $300 per month out of that deceased son's share in the income until the date of distribution fixed by Clause 12 of the Codicil (that is, 21 years after the date of the testator's death) if she should survive until that date. It is true that Clause 18 uses the words "during her lifetime," but the natural meaning of those words appears to me to be negatived by the succeeding words of the Clause which direct that the annuity is to be paid *out of the income of the share of the deceased son* before the same shall go over. If the annuity is to be paid out of the deceased son's share of the income then it can only be payable as long as such income exists, and it seems clear from Clause 24 of the Will that that income comes to an end in any event at the date of distribution. It also appears to me that the words "before the same shall go over" mean before the income of the share goes over under either Clause 15 or Clause 16, whichever might happen to apply.

Further, the construction that the annuity terminates at the date of distribution seems to receive some support from the fact that by Clause 26 of the Will as varied by Clause 13 of the Codicil the testator directs that if any of his sons shall have died before the date of final distribution leaving a lawful widow who shall be living at such date such widow shall at the date of final distribution receive a sum of $15,000. It seems improbable that, notwithstanding the use of the words "during her lifetime" in Clause 18, the testator intended that a deceased son's widow should, *after* the date of final distribution, continue to receive an annuity of $3,600 a year in addition to the capital sum of $15,000.

I can only conclude, therefore that the words "during her lifetime" were intended to mean "subject to her remaining alive."

Is, then, the widow's annuity charged on the corpus of the testator's estate, or is it a continuing charge on the income of her deceased husband's share, or is the widow merely entitled to her annuity out of such income as accrues during her life prior to the date of distribution?

If I have correctly interpreted the meaning of the words "during her lifetime" as stated above, then I think it is clear that there is nothing in the Will or Codicil to indicate any intention on the part of the testator to charge this annuity on the corpus of his estate. There certainly is nothing in Clause 24 of the Will, which deals with the realization and disposal of the corpus, to suggest that the dispositions of the corpus are in any way made subject to the performance of the trust for payment of the annuity. It seems to me probable that, as happened in a number of the cases which were cited during the course of the argument, the testator never anticipated that the income of any deceased son's share would be insufficient to satisfy the annuity and that consequently it never occurred to him to charge the annuity on the corpus of his estate.

I hold therefore that the widow's annuity is not a charge upon the corpus.

Similarly I can find no sufficient indication in the Will or Codicil of an intention on the part of the testator to constitute a continuing charge on the income not only during the widow's life but after her death (assuming that she dies before the date of final distribution).

I am of opinion, therefore, that what the widow of Lee Pang Seng is entitled to is an annuity at the rate of $300 per month out of her deceased husband's share of income until her death or until the date of distribution, whichever event shall first occur; and I think that she is entitled to have any deficiency made up over the whole period during which the annuity is so payable to her.

I might add that I have given careful consideration to the words in Clause 19 of the Will "subject to the provisions in the last preceding Clause", but it does not seem to me that those words affect in any way the conclusions at which I have arrived.

As regards the costs of this application, it seems to me proper that the costs of the parties to be taxed as between solicitor and client should be paid out of the corpus of the estate.

Order accordingly.

Solicitors for the Plaintiff (Applicant)—*Rodyk & Davidson.*

Solicitors for the Defendants (Respondents) *Allen & Gledhill.*

[ORIGINAL CIVIL JURISDICTION]

GERAHTY, J.

April 13, 1934.

TAN CHEW WAH.....Plaintiff.

vs.

TEO KANG SWEE.....Defendant.

[SINGAPORE SUIT No. 101 of 1934]

Practice—Writ—Incorrect Statement of Defendant's Address—Whether Material Defect—Civil Procedure Code, S. 1340.

By the Writ of Summons issued and served upon him personally in Singapore the defendant was incorrectly described as of No. 704, Serangoon Road Singapore whereas he resided at Pontian Ketchil in Johore. It was admitted on behalf of the Plaintiff that the defendant had a residence at Pontian Ketchil but the evidence disclosed that the defendant had also a place of address at No. 704 Serangoon Road, Singapore, at which he resided from time to time. Judgment by default was entered against the defendant and a bankruptcy notice issued and served upon him. Thereafter the defendant applied to set aside the writ on the ground that the address stated in the writ was incorrect and fictitious.

Held, that the incorrect statement of the defendant's address was not in the circumstances material and did not vitiate the writ.

Held further, that the application had not been made within a reasonable time in accordance with the provisions of section 1340 of the Civil Procedure Code.

Application made by way of Summons in Chambers on behalf of the defendant to set aside a writ of summons on the ground that the address of the defendant was incorrectly stated in the writ.

The facts and argument appear sufficiently from the judgment below.

Paul Storr for the Defendant (Applicant).

Fung for the Plaintiff (Respondent).

Cur. Ad. Vult.

GERAHTY, J.—This is an application by way of summons in Chambers dated the 26th day of March, 1934, on the part of the defendant in Suit No. 101 of 1934 for an order that the Writ of Summons in the action and all subsequent proceedings be set aside for irregularity on the ground that the defendant's address mentioned in the Writ of Summons is incorrect and fictitious and was known to the plaintiff to be fictitious and incorrect and not the address of the residence of the defendant.

The Writ of Summons is dated the 22nd February, 1934, by which the plaintiff claimed $3,111 being principal and interest due on two promissory notes. It is addressed to Teo Kang Swee of No. 704 Serangoon Road, Singapore. A copy of the Writ was served upon the defendant personally at No. 4, Raffles Place, Singapore, on the 28th February.

On the Writ appears an endorsement by the defendant to the effect that he lives at Pontian, Johore.

The defendant not having appeared, final judgment was entered for the plaintiff on the 10th March, 1934.

On the 15th March, 1934, a Bankruptcy Notice was issued in respect of the said judgment.

The application is supported by an affidavit of the defendant which sets out, *inter alia*, that he has never resided at No. 704 Serangoon Road, Singapore, which is the address of his brother Teo Kang Tee; that previous to April, 1933, he had resided at No. 122, Chin Swee Road, Singapore, and that since that date he has lived at Pontian Ketchil, Johore, and still lives there. Further that the plaintiff is well aware that he lives, and that his address is, at Pontian Ketchil, Johore, and that such is shown by correspondence with the plaintiff and in particular by a letter dated 5th September, 1933, in which the defendant informed the plaintiff that he did not live at No. 704, Serangoon Road, Singapore.

The letter in question contains the following passage:—

> "I do not stay at No. 704 Serangoon Road, Singapore, and only visit there 3 or 4 days in a month, and most of my time is spent in Pontian Ketchil, Benut and Batu Pahat where I am trying to get into business."

The defendant was cross-examined on his affidavit, from which it appears that he has since June last lived at Pontian Ketchil with his wife and 3 children; that he has 3 children living with his brother at 704 Serangoon Road, who are staying there while undergoing their education in Singapore. It appears that last year he visited No. 704, Serangoon Road from time to time and that he has received letters addressed there which are in the ordinary course re-directed to Pontian Ketchil from that address. He further testifies that the rent of No. 704 Serangoon Road is paid by his brother.

The plaintiff has filed an affidavit in which he denies that he deliberately, in order to evade the Rules of this Court, put the address of the defendant as in the jurisdiction of the Court.

He alleges that in fact the defendant has been and is residing at No. 704, Serangoon Road, and that Pontian Ketchil, Johore, is merely the defendant's temporary business address only; that at the end of January, 1934, when he intended to take proceedings against the defendant, he made enquiries and confirmed the fact that the defendant has been and was really residing at No. 704, Serangoon Road when that address was put in the Writ of Summons. Further that judgment was obtained against the defendant in